

1 IN THE UNITED STATES COURT OF FEDERAL CLAIMS

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4 BOTTOM LINE, INC., )

5 Plaintiff, ) Case No.

6 vs. ) 15-445L

7 THE UNITED STATES OF AMERICA, )

8 Defendant. )

9

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11 Suite A-805

12 Howard T. Markey National Courts Building

13 717 Madison Place, N.W.

14 Washington, D.C.

15 Tuesday, January 9, 2018

16 10:00 a.m.

17 Telephonic Status Conference

18

19

20 BEFORE: THE HONORABLE ERIC G. BRUGGINK

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25 Transcribed by: George Quade, CERT

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1 P R O C E E D I N G S

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3 (Proceedings called to order at 10:00 a.m.)

4 THE COURT: -- chat with you about the JPSR  
5 before turning you loose. The -- I mean, there's nothing  
6 that earth-shattering about it. It's just that the  
7 amount of time that you all have devoted in the future  
8 for both fact and expert discovery is kind of long, and I  
9 wondered how those dates were arrived at since we're  
10 looking at 15 months out for the -- sort of the closing  
11 status report.

12 So who wants to talk to me?

13 MS. KINSEL: I can, Your Honor. This is  
14 Krystalyn Kinsel with the United States.

15 THE COURT: All right.

16 MS. KINSEL: So, as you know, many of the  
17 events that are important to this case occurred in the  
18 late '80s to early '90s and even earlier than that.  
19 Since that time, many of the core employees and others  
20 with first-hand knowledge have either retired or moved  
21 on. Therefore, we need time to track down former  
22 employees and others with first-hand knowledge of the  
23 events that unfolded in this case.

24 And we also need time to conduct third-party  
25 discovery of prior landowners, surrounding landowners,

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1 and even the city. And then finally this case will  
2 involve discrete areas of expertise. I think both  
3 parties will need time to develop those expert opinions  
4 as we move on.

5 So together both parties agreed on these dates,  
6 taking all of those items into consideration. And up to  
7 now, the parties have had a very productive relationship  
8 and have worked well together. And, of course, if we  
9 don't need the time, then, you know, the United States  
10 will certainly let Plaintiffs know and the Court know as  
11 well.

12 THE COURT: Tell me, if I could, Mr. Moffitt,  
13 the complaint was filed in -- May 1st, 2015. That looks  
14 like about six years after your folks figured out what  
15 was going on. Is that fair to say?

16 MR. MOFFITT: Yes, Your Honor. It's close. I  
17 mean, basically we filed before the first event that my  
18 client noticed the flooding, or he claims he noticed the  
19 flooding, although it wasn't until a number of years  
20 after 2009 until he kind of decided what was really going  
21 on. So it was about six years from when he saw --  
22 personally saw the property flood.

23 THE COURT: The original easement, the 252-foot  
24 easement, was that formally articulated in those numbers  
25 in some fashion?

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1 MR. MOFFITT: Yes. So the 252 was acquired  
2 back in, I think, the '60s. I'd have to go back and see.  
3 Two fifty-two is the long-standing easement for the area.

4 THE COURT: Okay. So that's -- I mean, it was  
5 -- at some point the Complainant said that it was  
6 contemplated, but you're saying it's actually written  
7 that way. That's what -- you went to the property  
8 records, the Government would have them and then you can  
9 look (inaudible) 252 feet?

10 MR. MOFFITT: Yes. But what we're actually  
11 claiming now is they're actually appropriating up to 254.

12 THE COURT: Okay. And how -- if you can tell  
13 me, or maybe you can figure that out, how is it that the  
14 Government is able, first of all, to do that. What  
15 physically has changed in terms of locks and dams and  
16 that kind of thing?

17 MR. MOFFITT: So --

18 THE COURT: Or (inaudible) practice.

19 MR. MOFFITT: Well, we haven't got all the  
20 documents, so it might -- no, my understanding is  
21 basically that either there was an operational change or  
22 there's some testimony that the original design of the  
23 river, the Government did not calculate the actual  
24 correct easement that they needed. And they didn't  
25 discover that until maybe the late '80s -- and Krystalyn

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1 can maybe clarify that a little -- when they did a flood  
2 study. And at that point they decided --

3 THE COURT: And at the time they originally  
4 built these structures, they were physically capable  
5 perhaps of going up to 254. They didn't know it. And,  
6 in fact, in practice within the last six years of the  
7 complaint, they've actually been utilizing a higher  
8 easement.

9 MR. MOFFITT: Yes.

10 THE COURT: Okay.

11 Ms. Kinsel, have you found out anything  
12 different than that?

13 MS. KINSEL: You know, we're still conducting  
14 discovery. We're still -- I'm still looking into that,  
15 Your Honor.

16 THE COURT: And back to Mr. Moffitt. How much  
17 acres are we talking about? The total acres that your  
18 client owns and then the amount of additional land that's  
19 floodable at 254 feet?

20 MR. MOFFITT: So basically -- I'd have to look  
21 because he sold some off. I think he has like 90 acres.  
22 It's a platted residential subdivision. And if the  
23 Government is utilizing up to 254, that inundates over 90  
24 percent of his usable land, at times when they exercise  
25 up to 254.

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1 THE COURT: Have you seen it?

2 MR. MOFFITT: I have seen photographs and I  
3 have been on the property.

4 THE COURT: Okay. And is it close to Little  
5 Rock?

6 MR. MOFFITT: Yes, Your Honor.

7 THE COURT: I mean, within the --

8 MR. MOFFITT: It's within -- it's within  
9 Maumelle, which is north and west of the city. From  
10 downtown Little Rock, it is 20 minutes.

11 THE COURT: Okay. And so do we know why other  
12 landowners have not sued, or have they?

13 MR. MOFFITT: Well, the -- a number of  
14 landowners have had easements purchased by the  
15 Government. At least I've dug up a couple in my search  
16 trying to figure out what was going on, and the  
17 Government actually purchased the easement from -- I  
18 don't want to say adjoining in the neighbor, I can't  
19 remember about the adjoining landowners. I believe they  
20 have purchased from adjoining. And --

21 THE COURT: You mean at the higher elevation?

22 MR. MOFFITT: Yes, Your Honor.

23 THE COURT: Oh, I see.

24 Ms. Kinsel, anything you can tell me on that?

25 MS. KINSEL: No, Your Honor. I -- like I said,

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1 we're still conducting -- or I'm still looking into this.  
2 I took over this case just in October. So these are  
3 certainly issues that I'm trying to dig into.

4 THE COURT: Well, I'm not trying to tell you  
5 all your business, but if the Corps has been buying from  
6 adjoining landowners up to 254 feet, it looks to me like  
7 he might want to consider buying this chunk of land from  
8 the Plaintiff, or at least an easement.

9 Are there bluffs along the river there, or it's  
10 fairly shallow terrain?

11 MR. MOFFITT: This is fairly -- I mean, there  
12 are bluffs, but this land is flat and level. It's  
13 actually a peninsula that is out into the river. So  
14 there's a break on the -- I call that the west/northwest  
15 side, and then the river -- it actually is riverfront on  
16 the southern side.

17 THE COURT: Now, are there houses on the  
18 peninsula?

19 MR. MOFFITT: No, Your Honor. This is a -- my  
20 client purchased the property to do a development, and so  
21 he went, platted, subdivided and was beginning -- he  
22 purchased the land in 2006. He had to deal with a number  
23 of lawsuits. Basically an adjoining golf course and some  
24 property owners complained about his ingress/egress. He  
25 had some fights with the city. So he basically bought



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1 himself about two or three years of litigation, and he  
2 finally got that resolved and began constructing his  
3 subdivision. And at that point in 2009 is when he  
4 observed the initial flooding of the property.

5 THE COURT: Is there any blacktop road out to  
6 these lots?

7 MR. MOFFITT: There is a road bed. It is not  
8 paved or blacktopped yet. He basically has gravel road  
9 and then just hard-packed dirt. And once he observed the  
10 flooding, he kind of shut down his operation to figure  
11 out what was going on. But there's clearly roads and  
12 gravel roads and we can get access to the property.

13 THE COURT: Do you know what he paid for it?

14 MR. MOFFITT: He paid initially, I think,  
15 \$300,000 for this property.

16 THE COURT: Is that -- you said 90 acres? Is  
17 that what you said?

18 MR. MOFFITT: It was more than that. It was --  
19 there's been lots of transactions. He paid like \$300,000  
20 for a couple hundred -- I think it was like 200 acres.  
21 He sold a portion of that to the city. Everything below  
22 252, he sold that to the city for a park. And his  
23 development included access trails and things where the  
24 city could utilize that land. He -- to resolve some of  
25 the other lawsuits and kind of facilitate development, he

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1 purchased additional land adjacent to this, which became  
2 a subdivision and his access road and began building an  
3 access road down through -- relocating the access road  
4 from the golf course to around the golf course.

5 THE COURT: Okay.

6 MR. MOFFITT: And so --

7 THE COURT: And the park land, is that -- is  
8 that between where the lots would be and the water?

9 MR. MOFFITT: On one side. So basically the  
10 southern side of the peninsula, all the lots are  
11 waterfront. On the north side, everything that's below  
12 252 was sold to the city and is the park land. That land  
13 also is waterfront, but it doesn't front the actual river  
14 channel. It fronts a break.

15 THE COURT: Mm-hmm. And has the city done  
16 anything with that?

17 MR. MOFFITT: No. They've just been kind of  
18 sitting around, you know, waiting for the development.

19 THE COURT: Mm-hmm.

20 So, Ms. Kinsel, am I right in assuming that you  
21 don't know what it is that the Corps does that might  
22 periodically trigger anything, if it does, going up to  
23 254?

24 MS. KINSEL: I'm sorry, Your Honor, I didn't  
25 catch that.

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1 THE COURT: Do you know what it is that  
2 triggers -- well, on occasion or if that's what it is,  
3 the Corps flooding up to 254? Do you know what triggers  
4 that?

5 MS. KINSEL: I do not, Your Honor.

6 THE COURT: Okay.

7 And, Mr. Moffitt, any idea how often that  
8 happens?

9 MR. MOFFITT: We think it's -- so basically  
10 where we are now, we believe it happens a couple times a  
11 year and it's for a fairly significant duration as it  
12 pertains to a subdivision. Essentially my client hired  
13 an engineer to conduct a flood study to try to determine  
14 what was going on, and he has one portion of his property  
15 that is -- essentially this is Peninsula. So this is the  
16 entry point of his property. That's actually around 253  
17 elevation where his roadway is.

18 And so when we were getting the floods for long  
19 durations of time, this is, again, his expert, his  
20 opinion, that we're seeing these floods go for like seven  
21 or ten days, which the peninsula then becomes an island.  
22 So we're actually experiencing, you know, the impairment  
23 to our ingress/egress to our development before we even  
24 get to 254. We just know that 254 is what is anticipated  
25 for the property around.

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1                   And so what happens, then this causes a  
2     critical flowage zone or something like that in his  
3     report, is that when the water comes up you essentially  
4     cut off all ingress/egress, and so, therefore, my client  
5     has some real concerns about selling lots that, you know,  
6     we may have to rescue people to get out in a flowage  
7     event -- or a flood event.

8                   THE COURT:    Okay.

9                   MR. MOFFITT:   So we believe that it's -- you  
10    know, we're -- his report shows anywhere from -- you  
11    know, some years I think -- in the last 20 years he  
12    looked at, we had no events.   But most years we've had at  
13    least one, usually two.   Since 2006-ish, there seems to  
14    be an increase.   And that's something that we're trying  
15    to figure out, if there's been an operational change  
16    since that time that's actually made the frequency  
17    increase.   But we're seeing, you know, one to two events  
18    from, you know, five to seven days, five to ten days,  
19    occur.

20                  THE COURT:    Okay.   So you all agree on the  
21    schedule, I gather.   Let me go back to it for a minute.  
22    So the document exchange in a month and a half; fact  
23    discovery, the 15th, then it plays out.

24                  Well, I'll go ahead and adopt it.   It just --  
25    it seems to me it's a bit generous given the case.   It

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1 looks to me like it would be fairly straightforward to  
2 figure out what has happened and what the impact is. And  
3 my only thought would be assuming that we're not talking  
4 about a limitations problem, if, in fact, the Government  
5 plans on flooding this land up to 253 or -4 on occasion  
6 for significant periods of time, it ought to just go  
7 ahead and buy it. But I'll leave that to you folks. Of  
8 course, that begs the question of what it's worth. But  
9 that's all that I needed to know for the time being.

10 Anything else, Mr. Moffitt, you need to tell  
11 me?

12 MR. MOFFITT: No, Your Honor.

13 THE COURT: Okay. And, Ms. Kinsel?

14 MS. KINSEL: No, Your Honor. Thank you.

15 THE COURT: Okay. I would just ask that you  
16 explore some of this stuff fairly quickly to see if the  
17 game is worth the candle, as it were, rather than spend a  
18 year and a half on something that may be pretty  
19 straightforward. Okay. Thank you, folks.

20 MS. KINSEL: Thank you.

21 MR. MOFFITT: Thank you.

22 THE COURT: Bye-bye.

23 (Whereupon, at 10:15 a.m., the conference was  
24 adjourned.)

25

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1 CERTIFICATE OF TRANSCRIBER

2

3 I, George Quade, court-approved reporter,  
4 certify that the foregoing is a correct transcript from  
5 the official electronic sound recording of the  
6 proceedings in the above-titled matter.

7

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10 DATE: 1/25/2018

s/George Quade

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GEORGE QUADE, CERT

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